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No. 04-980

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent spends the bulk of his brief in opposition to certiorari criticizing the state for not raising various arguments earlier than it did. However, the state's arguments did not arise until the Ninth Circuit Court of Appeals rendered its decision in this case. California has always considered itself a non-weighing state, and the state has never conceded that California is a weighing state. The Ninth Circuit's classification of California as a weighing state created a new rule because it applied a new definition of "weighing" which has never before been employed by this Court. The Ninth Circuit's decision ignores that California juries consider all circumstances of the crime without any guidance as to how to weigh those factors to determine penalty. Finally, although not constitutionally required, California courts have repeatedly conducted their own state-law harmless error review in cases such as this one, and that standard is equivalent to the standard of *Chapman v. California*, 386 U.S. 18 (1967).

ARGUMENT

I.

THIS NINTH CIRCUIT CLASSIFICATION OF CALIFORNIA AS A "WEIGHING" STATE MISREADS THIS COURT'S DECISIONS AND CONFLICTS WITH THE STATE SUPREME COURT'S DETERMINATION THAT CALIFORNIA IS NOT A "WEIGHING" STATE

A. The Standard Used By The Ninth Circuit To Classify California As "Weighing" Conflicts With Authority From This Court

This Court has explained the difference between a weighing state and a non-weighing state. In a weighing state, a jury weighs specific statutory aggravating factors, and only those factors, against statutory mitigating factors, whereas in a non-weighing state, the aggravating factors used for eligibility have no specific function in selection. Rather, "'in making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.'" [Citation.] *Stringer v. Black*, 503 U.S. 222, 229-230 (1992).

Thus, this Court has distinguished between those states which limit the penalty selection task to consideration of a finite list of aggravating factors, as does Mississippi[1] and those states in which the aggravating factors used during the eligibility phase have "no specific function" in selection, but rather allow the jury to consider all the circumstances of the proceeding. *Id.*

While it is true that California has a list of aggravating factors, the first item in that list instructs juries to consider "the

1. See Miss. Code. Ann. § 99-19-101(5).

circumstances of the crime of which the defendant was convicted in the present proceeding. . . ." Cal. Pen. Code. sec. 190.3, subd. (a). Thus, as distinguished from the rather narrow list in Mississippi's statute, California instructs juries to consider all circumstances just like Georgia. This significant expansion of evidence that may be considered offsets the notion that an invalid special circumstance will have any effect on penalty selection.

Moreover, in Mississippi, the aggravating factors serve a specific function in penalty selection. As the Mississippi statute explains,

> (3) For the jury to impose a sentence of death, it must unanimously find in writing the following:
> * * *
> (b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and
> (c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

Miss. Code. Ann. § 99-19-101(3). In contrast, California juries are not required to make any "sufficiency" assessment at all. Rather, they are instructed merely to "take into account any of the following factors, if relevant." Cal. Pen. Code. sec. 190.3. Thus, the aggravating factors, incorporated through Cal. Pen. Code, sec. 190.3, subd. (a), do not have any "specific" function in penalty selection. Quite the contrary, this Court has already held that California's statute does not specifically instruct the jury how to weigh the facts and aggravating circumstances. *Tuilaepa v. California*, 512 U.S. 967, 979, 980 (1994). California juries apply the California factors as they choose. *People v. Brown*, 40 Cal.3d 512, 544 (1985). And, the decision is normative, not a mechanical counting of factors as it is under Mississippi's "sufficiency" test. *People v. Millwee*, 18 Cal. 4th 96, 164 (1998).

California juries only consider invalid special circumstances (when they exist) by virtue of the second clause

of California Penal Code section 190.3, subdivision (a). And, this "factor (a)" is only one of eleven statutory factors which together include virtually any evidence about the crime or the defendant that is even remotely relevant. This statutory directive to consider special circumstances in California is virtually identical to the "erroneous" instruction given by the state court in *Zant v. Stephens*, 462 U.S. 862 (1983), where the trial judge told the jury they could consider various statutory aggravating circumstances, including one found invalid. *Id.* at 865-866. This Court concluded that the error in the trial court's instruction was "merely a consequence of the statutory label 'aggravating circumstance'" which had "an inconsequential impact on the jury's decision regarding the death penalty." *Id.* at 888-889. Because the jury was expressly told to consider all facts and circumstances in both aggravation and mitigation, "any possible impact cannot fairly be regarded as a constitutional defect in the sentencing process." *Id.* at 889.

Thus, it is quite apparent that in California, where juries are always told to consider all "the circumstances of the crime of which the defendant was convicted in the present proceeding," the impact on penalty selection by virtue of the statutory directive to also consider special circumstances is just as "inconsequential" as it was in *Zant*. Accordingly, under this Court's precedent, California's statutory command, even if "erroneous" as was the instruction in *Zant*, does not rise to the level of constitutional error found in *Stringer* or *Clemons v. Mississippi*, 494 U.S. (1990). Rather, California is, at worst, the equivalent of a non-weighing state with an "erroneous" statutory instruction.

Despite this Court's established distinction between weighing and non-weighing states, the Ninth Circuit held that California "qualifies as a weighing state, because the jury's sentencing discretion is not boundless. . . ." Appendix A at 9002. The determination of whether a state is a weighing state has never depended solely upon whether the discretion is "boundless." Rather, this Court has looked at the precise nature

of the aggravating factors each state's statute contains, and more importantly, the role such factors play in the selection process. Thus, the Ninth Circuit's determination conflicts with the decisions of this Court, and certiorari should be granted to resolve the conflict. Supreme Court Rule 10(c).

B. The California Supreme Court Has Held That California Is Not A Weighing State, And The Ninth Circuit's Holding To The Contrary Presents A Classic Basis For Certiorari Review

The California Supreme Court has repeatedly held that it is a non-weighing state, and the Ninth Circuit decision below on this federal question is in direct conflict. Supreme Court Rule 10(a).

In *People v. Silva*, 45 Cal.3d 604, 632 (1988), the California Supreme Court expressly held that this court's decision in *Zant* (which applied to non-weighing states) was applicable to California death penalty cases where one or more special circumstances were invalid. Indeed, a quick glance at the dissent in *Silva* reveals that the very issue presented in this case was expressly rejected by the state court. *Id.* at 643-644. However, the majority of the state supreme court rejected that argument. Since that decision, the California Supreme Court has cited *Zant* when rejecting claims based upon the invalidity of one or more special circumstances, including in this case. *People v. Sanders*, 51 Cal.3d 471, 520 (1990). Subsequently, the California Supreme Court has found *Stringer* inapplicable to California. *People v. Bacigalupo*, 6 Cal. 4th 457, 476 (1993)

Respondent makes much of the fact that California's statute contains the word "outweigh" (see Cal. Penal Code sec 190.3) and that the selection process has been described using various forms of the word "weigh." Opposition at 9-10. However, he misconstrues the significance of the weighing/non-weighing distinction this Court's jurisprudence has drawn. The fact that a court describes the process of penalty selection as

"weighing" has no bearing on whether the state is a "weighing" state as this Court has used that term of art. Indeed, even when discussing the "non-weighing" Georgia statute, this Court discusses whether jurors would give an aggravating circumstance any "greater" or "special weight." *Zant*, 462 U.S. at 888, 890. The California Supreme Court has explained that "[i]n this context, the word 'weighing' is a metaphor for a process which by nature is incapable of precise description." *Brown*, 40 Cal.3d at 541 (1985).

The characterization of this issue as a simple matter of whether some form of the word "weigh" appears in the state or the jury instructions is itself simplistic. Opposition at 13. The terms "weighing" and "non-weighing" are terms of art with meanings separate from the phrasing used to describe the process of deliberation. California has recognized this Court's jurisprudence on this point, and has repeatedly deemed itself to be a non-weighing state, as in *Zant*.

C. Petitioner Has Never Conceded That California Is A Weighing State

Contrary to the suggestion by respondent (see Opposition at 5), the state has never accepted respondent's argument that California is a weighing state. Rather, the state's position all along has been that the harmless error standard of review applied by the California Supreme Court in this case is more than sufficient to pass constitutional muster. Because that was dispositive, the state "assumed" for purposes of argument that California was a weighing state, but argued that *Clemons* did not apply because the case did not present the type of automatic affirmance approach rejected in *Clemons*. *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 42, 45.

Prior to the Ninth Circuit's published decision in this case, there was no Ninth Circuit case law explaining how California could possibly be classified as a weighing state. All that was extant prior to this decision was a single clause in *Allen v.*

Woodford, 366 F.3d 823, 857 (9th Cir. 2004) declaring California a weighing state with absolutely no analysis and only a citation to *Silva v. Woodford*, 279 F.3d 825, 829, fn. 1 (9th Cir. 2002), which itself makes the same declaration with no supporting analysis. In *Allen*, of course, the Ninth Circuit affirmed the denial of the habeas corpus petition, and the state therefore had no reason, nor indeed any vehicle, to challenge the "weighing" designation. In *Silva*, the Ninth Circuit found ineffective assistance of counsel during the penalty phase, but the unsupported determination that California is a weighing state was not implicated because there were no issues relating to invalid special circumstances raised in that appeal. Thus, again, there was no practical basis for the state to challenge the Ninth Circuit's incorrect designation.

It was not until the opinion below in this case, where habeas relief was expressly predicated upon the erroneous designation of California as a weighing state, that the issue became squarely presented. Accordingly, this Court should grant review on Question 1.

II.

TEAGUE IS PROPERLY RAISED IN THE PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit's determination that California is a "weighing" state was an application of a new rule of constitutional law. *Teague v. Lane*, 489 U.S. 288 (1989) provides a defense for states against courts applying new rules of criminal procedure on collateral review. Until the Ninth Circuit rendered its decision in this case, the *Teague* issue was not apparent, as it was not until the Ninth Circuit ignored this Court's precedent and employed a new standard for designating states as "weighing" states that a new rule had been created.

This Court has observed that despite a state's failure to raise the issue earlier, it "undoubtedly ha[s] the discretion to reach the State's *Teague* argument. . . ." *Schiro v. Farley*, 510

U.S. 222, 229 (1994). Moreover, the Ninth Circuit's failure to address *Teague* is in conflict with the Fifth Circuit's approach in *Jackson v. Johnson*, 217 F.3d 360, 363 (5th Cir. 2000), where the court stated that

> absent a compelling, competing interest of justice in a particular case, a federal court should apply Teague even though the State has failed to argue it. Fundamental principles of fairness are not the states' to waive.

Moreover, in *Godinez v. Moran*, 509 U.S. 389, 397 fn. 8 (1993), this Court faulted the state "because petitioner did not raise a *Teague* defense in the lower courts *or* in his petition for certiorari." Emphasis added. Here, in contrast, the state did raise the issue in the petition for certiorari. Accordingly, review should be granted on Question 2.

III.

THE NINTH CIRCUIT IGNORED STATE LAW REGARDING THE HARMLESS ERROR ANALYSIS THAT IS APPLIED WHEN A CALIFORNIA SPECIAL CIRCUMSTANCE IS FOUND INVALID

Contrary to respondent's argument (see Opposition at 19), the state has at all times argued that the state court reviewed the presence of invalid special circumstances under a harmless-error standard that was constitutionally sufficient. Respondent's brief in opposition actually makes the state's argument stronger. See Opposition at 18. The state court found the error "benign" and cited prior state court decisions applying the state-law reasonable possibility test. Appendix C at 67-68. This California state test is the same as the *Chapman* standard.

Respondent's only substantive criticism of the reasoning is that the state court decision cited in the petition, *People v. Jones*, 29 Cal.4th 1229, 1264 n. 11 (2003) postdates the state court decision in this case by 13 years. Opposition at 18. However, even a passing glance at the *Jones* case reveals that it

cites cases from 1998 and 1991. And, upon reading those cases, it is apparent that the state court had equated the state law reasonable probability test with the *Chapman* standard as early as 1988—two years *before* the state court affirmed this case. *People v. Ashmus*, 54 Cal.3d 932, 965 (1991) (discussing the opinion to the same effect in *People v. Brown* (1988) 46 Cal.3d 432, 467 (conc. opn. of Mosk, J.)).

Thus, contrary to respondent's assertion, the state court did not create a fiction and reach back in time to render a post-hoc rationalization. See Opposition at 20. Rather, the state court did what courts frequently do: it relied upon long-settled principles of state law without necessarily citing to the first case to establish the proposition.

Although respondent criticizes the state supreme court for failing to cite *Chapman*, it must be remembered that "[f]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation." *Bell v. Cone*, ___ U.S. ___, 123 S.Ct 847, 2005 U.S. LEXIS 1369, *15. Rather, the courts must presume that the state court followed its own law. *Id.* In light of California's long-standing state-law precedent and the state court's reliance upon that precedent, the Ninth Circuit's determination that the state court failed to find the error harmless beyond a reasonable doubt (Appendix A at 9004) is in direct conflict with the state court on an issue of state law which directly impacts the underlying federal question presented in this case. The California Supreme Court is the final arbiter of state law. *Stringer*, 503 U.S. at 234 (1992). The Ninth Circuit cannot be permitted to ignore state law simply to manufacture federal constitutional error. This Court should therefore grant certiorari review on Question 3.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be granted.

Dated: February 22, 2005

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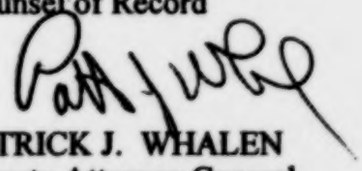

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